IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

AMERICAN WASTE MANAGEMENT AND RECYCLING, LLC. Plaintiff, v. **CEMEX PUERTO RICO; CANOPY ECOTERRA CORP.; XYZ INSURANCE COMPANIES.** Defendants.	CIVIL NO.: 07- 1658 (JAF) BREACH OF CONTRACT; COLLECTION OF MONIES; and DAMAGES. JURY TRIAL DEMANDED

AWMR'S REQUEST FOR PRESERVATION ORDER AT CEMEX SITE AND FOR INSPECTION IN ACCORDANCE WITH DOCKET NO. 25

TO THE HONORABLE COURT:

NOW APPEARS Plaintiff **AMERICAN WASTE MANAGEMENT AND RECYCLING**, **LLC,** (hereinafter, "AWMR") and through the undersigned attorneys, respectfully **STATES, ALLEGES** and **REQUESTS** as follows:

I. INTRODUCTION

On August 23, 2007, AWMR filed a Motion Requesting Order, because it was not allowed to fulfill its site inspection and an inventory of AWMR's equipment and materials at the CEMEX premises as scheduled. At that time, AWMR deemed this course prudent while the Court issued it opinion in the matter at hand, and because it had information that placed Ecoterra at the CEMEX plant in Ponce actively taking scrap metal from the site. On September 11, 2007, the Court GRANTED said motion (docket No.25). In furtherance thereof, AWMR files the

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present motion, to immediately halt all activity at the site per the Order, and permit an on-site inspection of the complete CEMEX premises (including the transport facilities not on the main site and the underground floors of the plant); in short, all areas belonging to CEMEX, including, but not limited to, areas where AWMR worked, had personnel present and has equipment present.

II. ARGUMENT

A. Counsel for CEMEX was not present at the inspection

In its opposition to AWMR's motion requesting Order (docket No. 19), CEMEX tried to confuse the Court with facts that they themselves did not witness, as *no CEMEX counsel was present at the inspection*. AWMR must make clear to the Court that, *despite CEMEX allegations to the contrary, there is AWMR equipment at the "transport facilities" that CEMEX indicates are located "outside" its main plant*; that is the "motor pool" that AWMR referred to in its Motion Requesting Order (docket No. 14). Why CEMEX would allege that there is no AWMR equipment there when it was not present at the inspection is bizarre at best, but *AWMR has photographic evidence placing at least one of its containers at that site.*

B. AWMR's harvested materials have been removed from the site

In that motion, CEMEX further stated that it has "stayed all dismantling and removal of scrap" at the Ponce plant. AWMR has always alleged, and continues to do so, that CEMEX has allowed Mr. Barsotelli and Ecoterra continued access and entrance to the plant and complete access to the dismantling process begun by AWMR at the plant, just like CEMEX aided and abetted Ecoterra in allowing it after-hour access to AWMR's copper and aluminum containers a few months ago. These actions resulted in the theft of these containers by Mr. Barsotelli from the CEMEX premises, which were valued at over Two Hundred and Fifty Thousand Dollars

($250,000.00). That counsel for CEMEX would even make such an allegation when they were not present at the inspection, implies that at minimum, they are being grossly misinformed by their client. AWMR has now learned that all the material that it had left harvested at the site when CEMEX allegedly paralyzed all activity and AWMR personnel was ordered to leave the site, has been effectively removed.

C. Continued detention of the containers will eventually paralyze all of AWMR's operations in Puerto Rico

AWMR submits that its operations are continuing to be seriously affected by these actions, as its containers continue to be illegally detained by Defendants with no legal justification for it. Co-Defendant Ecoterra cannot legally claim any title to the contents of the containers, and as a matter of fact, had initially authorized for their removal from the site *in writing*, only to later rescind that authorization for unknown reasons. *See Exhibit 11* to the Verified Complaint filed at docket No. 1; and its translation, *Exhibit 5* to docket No. 16 at page 5). As a result of these illegal actions, AWMR's operations at the ports are being hampered, with the trucking companies refusing to do any work for AWMR. The harm befalling AWMR specifically consists of companies refusing to lease AWMR chasses and preventing its container movements due to the fact that so much time has passed from the original date of lease.

As time passes, not only does the cost of the lease to AWMR increase, but the lessors worry over their containers that have been checked out over a span of many months without their return. The result is that they will refuse to lease any further containers or chassis to AWMR, and they will refuse to move any AWMR equipment and containers. This will effectively serve to bring AWMR's work in Puerto Rico to a complete stop. As the Court can see, this is a very serious matter, whereby all future AWMR exports from Puerto Rico can and will be affected.

D. Inspection is necessary in order to preserve the site and the evidence and is a remedy within the inherent power of this Court

Finally, and as previously stated, AWMR has been able to corroborate that the harvested material that AWMR referred to in its motion in Compliance with Order (docket No. 9), is no longer at the site; in other words, the site is not at a standstill, as Defendants would have the Court believe. An inspection and inventory of all areas is necessary not only for preservation, but is also necessary for the assessment of the damages AWMR has suffered as a result of Defendants' continued and flagrant removal of metals from the site. At this point, AWMR does not put it past Defendants to use agents to bypass any preservation order the Court might issue. Only an order allowing for a complete site inspection the total paralyzation of extraction or movement of any and all metals at the site and the setting of a prompt hearing can bring this situation to a conclusion.

Courts have routinely held that they have the inherent power to order that evidence be preserved and have, for good cause, required that specific procedures be adopted to ensure such preservation. *See, e.g., Illinois Tool Works, Inc. v. Metro Mark Prods. Ltd.*, 43 F.Supp.2d 951, 954 (N.D.Ill.1999); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 169 F.R.D. 598, 600 (D.N.J.1997); *see also Manual for Complex Litigation* (4th ed.2004) § 11.442 (noting that "[b]efore discovery starts, and perhaps before the initial conference, the court should consider whether to enter an order requiring the parties to preserve and retain documents, files, data, and records that may be relevant to the litigation"). According to one court, such preservation orders are "common in complex litigations," *HJB, Inc. v. American Home Prods. Corp., 1994 WL*

31005, at *1 (N.D.Ill. Feb.1, 1994), and are increasingly routine in cases involving electronic evidence, such as e-mails and other forms of electronic communication. *See Renda Marine, Inc. v. United States*, 58 Fed.Cl. 57, 62-63 (2003); *Wiginton v. Ellis*, 2003 WL 22439865, at * 2 (N.D.Ill.,2003); *see also Manual for Complex Litigation* § 11.442, at 73 n. 161 (listing other cases in which such orders have been entered); and *Pueblo of Laguna v. U.S,.* 60 Fed.Cl. 133 (2004). The preservation order sought by AWMR is therefore entirely inherent in the power of this Court, and should be granted given the circumstances of this case, where CEMEX has yet to explain how three of AWMR's locked containers containing copper and aluminum were broken into after hours and removed from the CEMEX premises, when there was no AWMR personnel on the site.

Plaintiff further requests that an order be issued allowing it to fully inspect the complete CEMEX premises, including but not limited to the transport site and other sites not in the main CEMEX complex, and that video and pictures be allowed to be taken, so as to ensure that no further materials are removed therefrom until the Court has an opportunity to hold the hearing, and that exit from the CEMEX properties of any metals be prohibited. Since the plant is only about 20% operational, if that much – that is in fact the job that Plaintiff was contracted to do: to dismantle the plant in its entirety – this should pose no problem for Defendant CEMEX.

AWMR also respectfully requests again that the Court set this case on a fast-track and that it set a trial date for the next available date in the Court's calendar within the next sixty (60) days. Plaintiff further requests that compliance be mandated under penalty of sanctions, since the last time an inspection took place, as the Court is well aware, it was road-blocked by both Defendants while everyone was already in Ponce and the situation could have easily been remedied. As a final cautionary measure, Plaintiff respectfully requests that it be allowed to telephone the Court should any problem arise during the inspection, with the *caveat* that this resource will only be used should it become completely necessary in order to comply with the terms outlined by the Court's Order. A draft Order accompanies this Motion and has been sent to chambers for the Court's consideration and convenience.

WHEREFORE, AWMR respectfully requests that the Court **GRANT** this motion in its entirety; and that as a result thereof, among others, it issue an order paralyzing all work at the site; that it forbid the exit of any and all metals from the site, that it permit an inspection of the complete CEMEX facilities; that video and pictures of the condition of the site be allowed to be taken; that the Court issue its order under penalty of sanctions; and that it issue any further relief it deem just and proper under the law.

I HEREBY CERTIFY that on this same day, the present motion was filed with the Court's CM/ECF system, which will notify all counsel of record in this case.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of September, 2007.

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